2021 CAPITAL LITIGATION CONFERENCE: DELVING INTO DEFENSE EXPERTS

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EXPERTS AND DIFFERENT TOPICS

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MENTAL HEALTH

all you need to know!

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Rule 11

There is a presumption of competency

A.R.S. 13-4061

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Dusky v. United States, 362 U.S. (1960)

The test is whether the accused has sufficient present ability to consult with his lawyer "with a reasonable degree of rational understanding and whether he has a rational as well as a factual understanding of the proceedings against him"

This is codified in Rule 11 and A.R.S. 13-4501 et al.

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The mere diagnosis of a mental disorder does not mean the defendant is incompetent

State v. Harding, 137 Ariz. 278, 670 P.2d 384 (1983)

(same thing for ongoing psychiatric treatment)
State v. Duggan, 112 Ariz. 157 (1975)

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SERIOUS MENTAL ILLNESS

SMI: is not a diagnosis. It is a designation used in Arizona to identify people who need extra help because of their mental illness

Definition: a mental, behavioral, or emotional disorder resulting in serious functional impairment, which substantially interferes with or limits one of more major life activities.

To qualify: you need

1. A qualifying diagnosis
2. A functional impairment

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Qualifying diagnosis

The Following types of mental illnesses qualify:

Psychotic disorders
Major depression or other mood disorders

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Functional Impairment:

A functional impairment means difficulty in at least one of the following:

Living alone or with family, without supervision

Risk of harming self or harming others

Has hard time in school or work, or could get worse because of something else, like substance abuse.

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Rule 11 Procedures:

There must be a probable cause determination

State v. Superior Court, 111 Ariz. 212, 526 P.2d 1234 (1974)

There should be a finding of probable cause … which would justify the court holding the defendant for trial before conducting a mental examination of defendant.

see also: §13-4503(A) and Rule 11.2(a)(1)

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If no grand jury, must do a preliminary hearing.

State v. Pima County, 103 Ariz. 369, 442 P.2d 113 (1968)

It is the duty of magistrate to complete a preliminary hearing … regardless of defendant's mental condition. The request for competency comes after

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Evaluations:

What happens with reports?

If competent – returned to assigned attorney
If incompetent/restorable – goes through restoration
If incompetent/not restorable – dismissed, may have hospitalization

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competent

Reports will be sealed and cannot be unsealed without order from the court and only under few circumstances. Cannot be used to prove guilt

This means defense cannot use them either!

You may review the findings when determining appropriate plea offers

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incompetent/restorable

Occurs either in or out of jail
§13-4512 sets out reasons for in custody vs. community
Normally where def is when started unless issues occur
Normally takes 2-4 months to make deterimation
Defense may file motions to modify
(response will depend on basis for motion)

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following restoration

Once defendant found incompetent, rebuttable presumption of continued incompetency:

State v. Hehman, 110 Ariz. 459, 520 P.2d 507

evidence of restoration or malingering may be presented to rebut the presumption of imcompetence

State v. Lewis, 236 Ariz. 336, 340 P.3d 415 (App. 2014)

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incompetent/not restorable

law favors attempts at restoration

State v. Silva, 222 Ariz. 457, 216 P.3d 1203 (2009)

Because of this, usually don't stipulate to initial reports

Based on reasons for non-restorability – may refile charges

Rider v. Garcia, 233 Ariz. 314, 312 P.3d 113 (App. 2013)

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refiles

As stated, can refile charges

If Defense files a motion to dismiss because defendant earlier found incompetent and not restorable – contact Rule 11 attorneys

(I have responded to a million of these motions and we have not lost)

Probation violations are a bit different and will depend on time frame and other factors, so reach out to us again

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subsequent motions for rule 11 examination

If a defendant has already been through Rule 11 and has been found to be competent, any request for a new competency examination MUST be in writing and must include

defense counsel's belief supported by motion AND offer of competent proof are factors the court must evaluate.

U.S. v. Ives, 574 F.2d 1002 (9th Cir. 1978)

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factors to consider on subsequent requests

If Defendant has previously been found competent, the Court is allowed to review past record supporting the competency determination.

State v. Moody, 208 Ariz. 424, 94 P.3d 1119 (2004)

When Defendant has already gone through restoration and been found competent, alleging the same grounds does not create sufficient reason for a second evaluation.

State v. Lynch, 225 Ariz. 27, 234 P.3d 595 (2010)

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Civil Commitments

When a defendant is sent for evaluation it is NOT for purposes of restoration, it is merely a determination of whether court ordered treatment is necessary when the defendant is DTO, DTS, PAD, GD

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Sell Hearings

Defendants have the right to refuse medication outside of a court order. On some cases, the State can request a court force medicate a defendant for the purpose of restoration.

Sell v. United States, 539 U.S. 166 (2003)

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Sell v. United States

Government may involuntarily medicate a mentally ill defendant in order to render him competent to stand trial IF:

- treatment is medically appropriate
- treatment is substantially unlikely to have side effects that may undermine the fairness of the trial
- in light of less intrusive alternatives, it is necessary to significantly further important governmental interests

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Sell v. U.S.

- important governmental interests at stake
  - must consider the facts of the individual case
  - does failure to take meds result in lengthy confinement in institution?
  - has defendant already been confined for a long time for which he will receive credit?

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Sell v. U.S.

will involuntary medication *significantly further* state interests (will meds make him competent?)

are meds unlikely to cause side effects that will substantially interfere with defendant's ability to assist counsel at trial?

are meds necessary to further the state's interest (are there less intrusive methods that would work)

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what happens

we first try restoration without meds (least intrusive)

If/when dr says not restorable without meds, we ask for a psychiatrist evaluation for potential meds

We then ask for a hearing

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Sell hearings

Mixed Results

Great success at the beginning

2/3 restored to competency so far

Waiting on 2

Have recently had 2 denied

State v. Hawkins: CR2019-111462

State v. Gentry: CR2020-126162

State v. Grant: CR2019-156218

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Capital Cases

If you are asking a Court to force medicate a defendant for competency reasons, you should think carefully about your notice of seeking the death penalty.

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Guilty Except Insane

"If you commit a big crime then you are crazy, and the more heinous the crime, the crazier you must be. Therefore you are not responsible, and nothing is your fault."

Peggy Noonan, U.S. writer, newscaster

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"I've fully concluded that I was ill…"

Multi-millionaire John du Pont as he apologized for killing Olympic wrestler Dave Schultz on January 26, 1996.

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Historical Overview

1400's Wild Beast Standard:

Defense had to prove that defendant lacked the minimum understanding of a wild animal or infant.

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M'Naughten Test

- While attempting to assassinate British Prime Minister, killed his secretary instead.
- Was found not guilty on the grounds that he was insane at the time
- Public outrage followed
- M'Naughten Rule Developed

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M'Naughten Rule 1843

In order to establish a defense of insanity:

- Must clearly prove that at the time of committing the act, the accused
  - Was laboring under such a defect of reason, from disease of mind, as not to know the nature and quality of the act he was doing
  - Or, if he did know what he was doing, that he did not know it was wrong.

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Irresistible Impulse Test

- Created in response to M'Naughten
- 1st used by Alabama Supreme Court 1887
- Lorena Bobbitt found not guilty under this defense (released after 3 months treatment)
  - Defendant must establish that he/she was incapable of resisting the urge to commit the crime.
  - Policeman at your elbow test

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Durham Rule 1954

Durham V. United States (case since overruled)

An accused is not criminally responsible if his unlawful act was the product of mental disease or defect.

(because of difficulties with implementation, was rejected by the same court in 1972, adopting Model Penal Code Standard)

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Model Penal Code Standard 1962

A person is not responsible for criminal conduct where (s)he, as a result of mental disease or defect, did not possess "substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law".

- Broader than M'Naughten and Irresistible Impulse

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ARIZONA 1994

Guilty Except Insane
A.R.S. 13-502

A person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a **mental disease or defect** of such severity that the person **did not know the criminal act was wrong.**

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13-502

A mental disease or defect does not include disorders that result from:

- acute voluntary intoxication
- withdrawal from alcohol or drugs,
- character defects,
- psychosexual disorders
- impulse control disorders.

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Conditions that do not constitute legal insanity include but are not limited to:

- momentary, temporary conditions arising from the pressure of the circumstances
- moral decadence
- depravity or passion growing out of anger
- jealousy
- revenge
- hatred
- other motives in a person who does not suffer from a mental disease or defect or an abnormality that is manifested only by criminal conduct.

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13-503: Effect of Drugs or Alcohol

Temporary intoxication resulting from the **voluntary** ingestion, consumption, inhalation or injection of **alcohol**, an **illegal substance** under chapter 34 of this title or other **psychoactive substances** or the **abuse of prescribed medications** does not constitute insanity and is not a defense for any criminal act or requisite state of mind.

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Examinations

13-3993:

A. state gets the same number of experts

B. if defendant refuses to be examined by state's expert, he is precluded from offering evidence.

C. privilege doesn't apply 13-4508 and 11.7

D. get complete copies of ALL reports (not just those of ones who will testify

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13-4506 and Rule 11.8

A. defendant must consent – after a determination of a reasonable basis, court appoints an expert

(can request a doctor for a screening report and base the above appointment based on that 11.8b)

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State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981)

Trial court committed error in excluding testimony of psychiatrist that, in his expert opinion, defendant had difficulty dealing with stress and in stressful situations his actions were more reflexive than reflective, in that establishment of character trait of acting without reflection would have tended to establish that defendant acted impulsively, and from such fact jury could have concluded defendant did not premeditate the homicide.

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State v. Mott, 187 Ariz. 536, 931 P.2d 1046 (1997)

Evidence of defendant's mental disorder short of insanity is inadmissible either as an affirmative defense or to negate *mens rea* element of a crime.

Precluding defendant from introducing psychological testimony to challenge *mens rea* of a crime does not violate due process.

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Clark v. Arizona, 548 U.S. 735 (2006)

Arizona's narrowing of its insanity test did not violate due process

Exclusion of evidence of mental illness and incapacity due to mental illness on issue of *mens rea* did not violate due process. (Upholds *Mott* Ruling.)

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Clark

Clark had 2 defense tactics:

1. insanity defense;
2. rebut prosecution's evidence regarding intentionally and knowingly.

Reviewed *Mott* holding: testimony of a professional psychologist or psychiatrist about a defendant's mental incapacity owing to mental disease or defect was admissible only for it's bearing on insanity not on *mens rea*.

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Clark

3 types of evidence:

- Observation evidence: either by lay or expert witness of what defendant did or said at time of the offense;
- Mental-disease evidence: typically from professional psychologists or psychiatrists based on factual reports, professional observations and tests about defendant's mental disease with features described by the witness;
- Capacity evidence: typically from same experts about defendant's capacity for cognition and moral judgment.

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State v. Wright, 214 Ariz. 540, 155 P.3d 1064 (App. 2007)

Proffered testimony of defendant's expert witness that defendant did not have mental state necessary to commit offense was inadmissible. (because it wasn't "observation evidence")

"Observation Evidence" to show defendant didn't have the requisite mental state to commit the charged offense, includes evidence of defendant's behavior, statements, and expressions of belief around time of offense.

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State v. Turrentine, 152 Ariz. 61, 730 P.2d 238 (App. 1986)
State v. Fletcher, 149 Ariz. 187, 717 P.2d 866 (1986)

Placing clear and convincing evidence burden of proof on defendant is not unconstitutional.

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State v. Fayle, 134 Ariz. 565, 658 P.2d 218 (App. 1982)

Trial court must defer to wishes of Defendant with respect to presentation of insanity defense.

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State v. Tamplin, 195 Ariz. 246, 986 P.2d 914 (App. 1999)

"Wrong" for purposes of insanity defense should be defined by community standards of morality and not by defendant's subjective belief that he acted "rightly" in committing robbery by obeying "voices" even though he knew his conduct was wrong.

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State v. Skaggs, 120 Ariz. 467, 586 P.2d 1279 (1978)

Generally, evidence of crimes other than those for which defendant is on trial is not admissible; however, such rule does not apply when defendant raises issue of insanity, and thus previous conduct involving bad acts of defendant is admissible.

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Austin v. Alfred, 163 Ariz. 397, 788 P.2d 130 (App. 1991)

Expert disclosure rule did not limit required disclosure of name and reports of mental health experts retained by defendant in anticipation of insanity defense to those experts who would testify at trial and who prepared reports in anticipation of testimony. (this case also allowed defense to redact defendant's statements regarding the offense)

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State v. Hegyi, 240 Ariz. 251, 378 P.3d 428 (App. 2016)

Defendant is required to provide complete unredacted reports, but evidence of defendant's inculpatory statements, if any, could not be admitted to prove guilt.

(statements made to non-court appointed experts are voluntary and thus not subject to redactions; statements made to court-appointed experts can be used to show defendant knew what he was doing was wrong)

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State v. Hurles, 185 Ariz. 199, 914 P.2d 1291 (1996)

GEI is an affirmative defense.

Insanity defense does not vitiate presumption of innocence or negate state's burden of proof against murder defendant; state is still required to prove every element beyond a reasonable doubt and insanity defense does not require defendant to prove or disprove any element of offenses charged.

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Hurles cont.

First and fundamental rule with respect to insanity defense is that **any and all conduct of defendant is admissible in evidence; there can be no restrictions**, for if specific act does not indicate insanity it may indicate sanity, and it will certainly throw light one way or the other upon the issue.

No single act can be decisive in determining Defendant's sanity or insanity, while on the other hand, any act whatsoever may be significant to some extent.

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State v. Saiers, 196 Ariz. 20, 992 P.2d 612 (1999)

Cannot tell jury about consequences of GEI

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- State v. Bunting, 226 Ariz. 572, 250 P.3d 1201 (App.2011)
- U.S. v. Shorty, 741 F.3d 961 (9th Cir. 2013)
  - Defendant must waive a jury trial for submission to court on the record

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WHAT
TO
DO

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All that matters is whether defendant knew behavior was wrong and actions at time of the offense

LOOK AT THE POLICE REPORT!

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DEFENSE MUST NOTICE THE DEFENSE

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COURT MUST OBTAIN DEFENDANT'S CONSENT

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DEFENDANT SHOULD EITHER BE ASKING FOR A SCREENING REPORT

OR

HAVE HIS OWN REPORT FROM A DOCTOR SAYING HE IS GEI

(just saying he has a mental illness is not enough)

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COURT MUST FIND A REASONABLE BASIS

IF SO

COURT MUST APPOINT A DOCTOR

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In the Beginning

Once you know defense is using insanity, start collecting all evidence you can and provide to Doctor once appointed.

past police reports
past pre-sentence reports
school records
DOC records
jail tapes

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Mental Illness ≠ Insanity

- Is an affirmative defense
- Defendant must approve defense
- Defendant must cooperate with state's doctor
- Burden on defendant
- State must still prove all elements of underlying offense

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disclosure

Defendant MUST disclose all records
All privacy rights are waived
Styers v. Superior Court, 161 Ariz. 477, 779 P.2d 352 (1989)

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records

- Correctional Health Services (CHS)
  - Including tank orders
- Restoration to Competency (RTC)
- DOC
- Magellan, Value Option, any mental health
- Prior convictions
- Prior PSR
- Jail Calls
- Jail Reports/observations of detention officers

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best records

- Police Report
  - Defendant's statements
    - Admit it was wrong
    - Apologize
    - Invoke his rights
  - Defendant's behavior
    - Planning
    - Escape
  - Video/Audio Interview of Defendant

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best records

- Witness Statements
- Drugs or alcohol involved?
- Anger or jealousy involved?

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defense expert

You are entitled to

- All reports from any doctor that examined him
  - Not just the ones testifying
  - Use jail visitation to know who went
- Doctor's Report, Notes, Testing Material, Test Protocol, Raw Data
- Can get a protective order if necessary from the court, but they must disclose everything

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WHAT HAPPENS NEXT?

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A.R.S. § 13-3994

A. A person who is found guilty except insane pursuant to 13-502 shall be committed to a secure state mental health facility under the department of health services for a period of treatment.

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A.R.S. §13-3994

If the court finds that the criminal act of the person committed caused the death or serious physical injury of or the threat of death or serious physical injury to another person, the court shall place the person under the jurisdiction of the psychiatric security review board for the presumptive term. (this board is responsible for supervising defendant during this time)

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A.R.S. § 13-3994

- The court shall state the beginning date, length and ending date of the board's jurisdiction over the person.
- Jurisdiction is equal to presumptive sentence.
- Person under the PSRB's jurisdiction is not entitled to a hearing before the board earlier than **120 days** after the person's initial commitment.

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State v. Bomar, 199 Ariz. 472, 19 P.3d 613 (App. 2001)

Finding of GEI is not a criminal conviction.

Defendant receives no pre-incarceration credit for GEI sentence.

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State v. Heartfield, 196 Ariz. 407, 998 P.2d 1080 (App. 2000)

Court lacks authority to order GEI defendant to pay restitution.

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State v. Flynt, 199 Ariz. 92, 13 P.3d 1209 (App. 2000)

Phrase "substantial threat of death or physical injury" was not limited to conduct that involved substantial "actual" but also "apparent" threat of death or physical injury.

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AT PSRB HEARING

Mentally Ill/ Dangerous Stays at ASH	Mentally Ill/ Not Dangerous (stable remission) Released, retain jurisdiction
Not Mentally Ill/ Not Dangerous Released, retain jurisdiction (consider entire criminal history and propensity to reoffend)	Not Mentally Ill/ Dangerous ?????? Is a provision for sending to DOC, not used yet and unclear how it would work

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